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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA *Plaintiff in error,* *v.* THE CORONADO BEACH COMPANY.	No. 524.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

PETITION FOR REHEARING.

Come now the United States, plaintiffs in error in the above entitled cause, and respectfully present their petition for a rehearing.

As the result of the ruling of the trial court that defendant in error, as the private owner of 663 acres of lands under navigable water, was vested with practically complete rights to utilize them for private purposes free of governmental control, the appraisal of fast lands expropriated by the government was enormously augmented. This court has

decided that Congress directed by the Act of July 27, 1917, c. 42, 40 Stat. 247, that these submerged lands be expropriated and appraised. The ruling as to title affirmed by this court raises questions of some economic and public importance. The points of law involved are, it is believed, novel. Moreover, the judgment compels payment to defendant in error of a large sum as compensation for the expropriation of submerged lands, to which, as the Government still respectfully contends, the State of California has clear title. If they have been expropriated their appraised value justly belongs to the State and not to the Coronado Beach Company.

The Government therefore respectfully urges consideration of the following propositions:

I.

The Act of March 3, 1851, c. 41, 9 Stat. 631, did not confer upon either the judicial or the administrative agency set up, jurisdiction to adjudicate or to deal with private Mexican claims to lands under navigable waters.

II.

At most the asserted extinguishment or destruction of California's title, otherwise vested in her by her admission in 1850, must result from a decree of confirmation. Since there was no such decree, the State's title could not be extinguished or destroyed by an ultra vires survey and patent.

III.

Conceding for argument that titular ownership passed by the confirmation and patent, the right to utilize the lands for private purposes is subject both to State and Federal control to an extent which the instructions to the jury and its appraisal based thereon wholly failed to recognize.

I.

The limits of the jurisdiction of the California Land Commission.

The Government does not insist that the Congress itself through appropriate legislation (passed before or after the admission of California) was constitutionally incapable of recognizing as valid under treaty obligations and of confirming Mexican grants covering lands under navigable water, even though the consequence of such recognition or confirmation might be to affect the otherwise unassailable title of California thereto. This point is perhaps settled beyond cavil, and *congressional power* to this extent is recognized by *Knight* v. *Land Ass'n*, 142 U. S. 161; *San Francisco* v. *Le Roy*, 138 U. S. 656; *Shively* v. *Bowlby*, 152 U. S. 13, 47, although, theretofore, in *Goodtitle* v. *Kibbe*, 9 How. 470, this court had denied the power of Congress after the admission of Alabama to satisfy at her expense imperfect or inchoate claims (which is the character of the one here involved) covering such submerged lands.

Unquestionably, however, power to recognize and to confirm such claims is in *Congress* and not in the courts. *Grisar* v. *McDowell*, 6 Wall. 363, 379. Moreover, Congress may exercise its power by direct legislation or it may delegate authority to a commission such as that created by the Act of March 3, 1851, c. 41, 9 Stat. 631. And it would seem axiomatic that the Congress may delegate to a commission either the whole or only a portion of its proper powers in this regard.

The point here made by the Government is that in this instance and by the terms of this statute Congress in fact delegated to the agencies set up thereby only a portion of its plenary power to satisfy Mexican claims and that by a true construction of the text and meaning of this law the jurisdiction and powers of the commission were confined to hearing and determining claims to "public lands" and hence it was without delegated power to deal, on behalf of a private claimant, in any manner with title to soil underlying navigable waters within the State of California.

The point which the Government desires again to urge is therefore purely a question of statutory construction and of the true meaning of the language employed in the Act of March 3, 1851, *supra*.

As an aid in determining the meaning of this statute, it is proper to consider the state of existing law and policy at the time of its enactment. At that time, unquestionably, it was firmly established that, under neither the common law nor the civil law, was it customary or indeed permissible (barring isolated an

exceptional cases) for the sovereign to grant to *private claimants* lands below the limit of high water mark. Moreover, under existing Mexican law and under the Colonization law of August 18, 1824 (Hall's Mex. Laws, p. 147), the territorial governors of California were wholly without power to grant lands below high tide, and this, it may be assumed, was within the knowledge of Congress. It may be also proper to note, merely as a further aid in textual construction, that at the time (1851) of the passage of this statute the principle laid down in *Goodtitle* v. *Kibbe*, *supra*, was perhaps regarded as sound law, and hence to assume that Congress would not, without deep consideration and careful choice of language, undertake to set up subordinate tribunals vested with plenary power to confirm inchoate Mexican grants affecting the submerged lands of California, already admitted to the Union on equal terms with her sisters and like them presumably entitled to full control and ownership of public waters.

With the foregoing considerations to guide, we come to construe the text of the Act of March 3, 1851, *supra*, and to inquire what was the extent of the jurisdiction conferred thereby on the Land Commission and on the Land Department.*

The Government contends that the text, reasonably construed, confers on these bodies jurisdiction only over "public lands" or "public domain" and that these phrases have meanings strictly limited and accurately defined and, when used in a federal stat-

*The full text of the act is printed in an appendix.

ute, exclude any lands except such as are open to disposition, settlement and entry under the applicable laws of the United States. That is the definition given by this court in a case decided on this statute, *Newhall* v. *Sanger*, 92 U. S. 761.

Considering what has been said, is it not reasonable to argue that, even if the Congress of 1851 had in mind the possibility that the public harbors of California had, in fact, been parcelled out to private individuals by Governor Pio Pico and his predecessors, it would have reserved to itself the disposal of such claims and the determination of the Government's treaty obligations in such unprecedented cases? It is not fair to assume, *a priori*, that there would naturally be no delegation of such responsible authority to a mere commission and that powers, crippling, as they well might, the exercise of full sovereignty by a State of the Union, would not be put in commission without clear language. In reading the text the assumption is borne out. There is no language there remotely hinting at such powers, and we find in section 13 of the statute a clear and unmistakable guide to the construction here urged. It is there provided:

> That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the

> date of this act, shall be deemed, held, and considered as a part of the *public domain of the United States.*

The pertinence of the argument drawn from this section can be illustrated, if need be, by the facts detailed and the claim made in the case of *Dominguez* v. *Banning*, 167 U. S. 723. Appellants there based their claim to the island in controversy on the argument that the entire area constituting the navigable inner Bay of San Pedro had been confirmed to them by the decree of the Land Court constituted by the Act under discussion, and that this area was also legally and actually within the original calls and boundaries of their Mexican grant. On considerations not particularly relevant to the topic presently discussed the litigation resulted in a denial of this claim. In substance it was adjudged that the claim had been rejected by the agencies set up by the Act of 1851.

Considering the text of section 13 of the Act of 1851, what legal result followed final rejection of the claim of Dominguez? Were the lands composing the rejected claim as provided in section 13 thereafter to be "deemed, held and considered as a part of the public domain of the United States?" Obviously not, unless the rejection of a claim or failure to present it within two years would have the amazing effect of translating or transforming a part of the public property of California into a portion of the "public domain" of the United States. So in the instant case, assuming for argument that claimants

did, in fact, present, for confirmation, to the Land Commission a Mexican grant actually covering the 663 acres of lands under water here in question, and assuming further that the claim had been there definitely rejected, such rejection would not have the consequence called for by section 13, *supra*, since submerged lands could not possibly revert to the "public domain" of the United States. Does it not follow that section 13 is incapable of intelligible construction and that it cannot be read consistently with any hypothesis except the one here urged, namely, that the purpose of the statute was to confine the jurisdiction and powers of this commission to the "public domain" in the narrow sense to which that term has been restricted by repeated decisions of this court? It is for this reason perhaps that Mr. Justice Harlan in *Dominguez* v. *Banning*, page 744, was careful to say that the opinion was confined to the fast land in controversy and decided nothing in respect of the title of California to the submerged lands of the bay.

It is to be noted also that considering all the legislation of Congress * on the subject of California land claims, it clearly appears that the one controlling purpose of Congress in its enactment was *speedily* to free the "public lands" of the United States from the incubus of invalid Mexican claims thereto so as to permit them to be homesteaded and settled on by American citizens in consonance

* Act March 3, 1851, c. 41, 9 Stat. 631, §13; August 31, 1852, c. 108, 10 Stat. 76, 91; March 3, 1853, c. 145, 10 Stat. 245, §3; June 14, 1860, c. 128, 12 Stat. 33; July 1, 1864, c. 194, 13 Stat. 332; July 23, 1866, c. 214, 14 Stat. 220, §8.

with the immemorial policy thus to build up the civilization of our acquired territories.

The purpose and scope of the Act are well described in *Botiller* v. *Dominguez*, 130 U. S. 238, 249, where it is said, in substance, that the aim of the statute was attained whenever the lands which the United States owned as property which could be sold to others, either absolutely or by permitting them to settle thereon with preemption rights, or which could be reserved from public sale entirely, were separated from those lands which belonged, either equitably or legally, to private parties under a claim of right derived from the Spanish or Mexican governments.

The view here urged does not conflict with any construction heretofore put upon this statute in any case whose facts resemble those presented here. In *Knight* v. *Land Ass'n*, 142 U. S. 161, it was held that lands lying below high water mark of Mission Creek, a navigable arm of the Bay of San Francisco, were part of and, in fulfillment of treaty obligations, must pass to the Pueblo of San Francisco because included within the Pueblo as established by the Mexican government. But the distinction between that case and this is clear. There the question here made as to the jurisdiction of the Land Commission was not open, because the claim of the Pueblo had been confirmed not alone by the tribunal set up by the Act of 1851 but by congressional act. Act of March 8, 1866, c. 13, 14 Stat. 4. Whatever, therefore, may have been the true limits of the

jurisdiction of Land Commission or of Land Department, these could not be and were not an issue in the *Knight* case, because there California's claim to the disputed land had been effectively silenced in favor of the Pueblo by special legislation of Congress, and as to the power and jurisdiction of Congress thus to satisfy treaty obligations at the expense of the State's public domain before or after its admission, there can now, perhaps, be no question.

United States v. *Santa Fe*, 165 U. S. 675, 716.
Grisar v. *McDowell*, 6 Wall. 363, 378.
The Pueblo case, 4 Sawyer, 553, 583.

The powers of the Land Commission in respect of the claims of pueblos are defined in the Act of March 3, 1851, in a separate section (14) wherein is declared and recognized a presumption in favor of a grant from the mere existence of the pueblo. Practically, therefore, the duties of the commission were to define the limits of the grant. The Mexican pueblo, like its successor the City of San Francisco, was but an arm of government. Hence the decree and the Congressional act explicitly confirming it did not have the effect of divesting California of her sovereign control of public property or public waters within the definitively declared limits of the municipality. Since the city was a mere arm of California state government, and since enjoyment of that portion of the four square leagues which actually passed under municipal control was subject to the legislative power of the State, there was no reason why Congress (as it in fact did) should not have con-

firmed the claim. The pueblo title to the navigable inlets and streams within her four square leagues was of a quality wholly different from that which might be asserted and which is here asserted by a *private claimant*. The pueblo and its successor in title, the City of San Francisco, acting always under the guidance of the State, owned and controlled these highways and public places and disposed of them by reclamation or otherwise under trusts for the *benefit of the people of the state*. They were in no sense private property.

As said in the *Pueblo* case, 4 Sawy. 566:

> It is difficult to determine with precision the exact character of the right or title held by pueblos to the lands assigned to them. The government undoubtedly retained a right to control their use and disposition; and to appropriate them to public uses until they had been vested in private proprietorship. Numerous laws have been cited to show that the title remained absolutely in the government. The same laws were cited to the Supreme Court of this State when the subject was before that tribunal, and in relation to them the court said: "We see nothing in these laws opposed to the views we have already expressed, that the towns had such a right, title and interest in these lands as to enable them to use and dispose of them in the manner authorized by law or by special orders, and consonant with the object of the endowment and trust. Undoubtedly the right of control remained in the sovereign, who might authorize or forbid any

municipal or other officer to grant or dispose of such lands, even for the purposes of the endowment or trust. Such general right, with respect to a public corporation, exists in any sovereign State, and must, of course, have existed in the absolute monarchy of Spain, where the property of private corporations and individuals was to a great degree subject to the royal will and pleasure." (*Hart* v. *Burnett*, 15 Calif. 569.) And referring to objections to the theory of absolute title in the pueblo, and the questions which upon that view might be suggested, the court said: "There is but one sensible answer to these questions, and we think that answer is given in the laws themselves, and in the recorded proceedings of the officers who administered them, and who must be presumed to have interpreted them correctly. It is, that the lands assigned to pueblos, whether by general law regulating their limits to four square leagues, or by special designation of boundaries, were not given to them in absolute property, with full right of disposition and alienation, but to be held by them in trust for the benefit of the entire community, with such powers of use, disposition and alienation, as had been already or might afterward be conferred for the due execution of such trusts, upon such pueblos, or upon their officers." (Id. 573.) And this view, the court adds, fully reconciles the apparently conflicting disposition of the laws and the commentaries of publicists respecting the relative rights of the Crown and the municipalities to which counsel had referred.

> In this view of the nature of the title of the pueblo and of the city, its successor, I fully concur.

See also *Grisar* v. *McDowell*, 6 Wall. 373, cited in *United States* v. *Santa Fe*, 165 U. S. at pages 708 and 713.

Moreover the title which this court in the *Knight* case declared invalid as against a private estate in the reclaimed land derived from the pueblo, originated in a deed from the tideland commissioners of the State. But as pointed out in *Tripp* v. *Spring*, 5 Sawy. 209, 211, and in the *Knight* case, at pages 193, 194, the superior rights of claimants under the pueblo title had been theretofore fully recognized by the State in consequence of confirmatory legislation recognizing city boundaries identical with those established by the decree of confirmation. Hence, although the parcel in dispute in the *Knight* case may have been, on the admission of California, below high water mark of Mission Creek, the claim of the State thereto had been barred by this recognition. The title, therefore, had elements of validity wholly absent from that presented in the case at bar. Here it cannot be pretended that the State of California had ever assented to the survey which excluded her from ownership of 663 acres of her public domain.

The effect of the confirmation of the pueblo claim was simply to place four square leagues of California soil within the bounds of one of her municipalities. Dominion over navigable creeks and inlets

and other public places within this area passed under trusts for purposes recognized as wholly within the control and direction of State legislative power.

The only case in which the question of the jurisdiction of the land court to deal with California's submerged lands in favor of a private claimant can be regarded as having been remotely mooted is *Teschemacher* v. *Thompson*, 18 Calif. 11. The land there actually in dispute lay between the spring tide and the neap tide and would have been, of course, technical public lands of the United States. The same is true of the parcels in dispute in *Ward* v. *Mulford*, 32 Calif. 365, and *Valentine* v. *Sloss*, 103 Calif. 215, in which cases *Teschemacher* v. *Thompson* is cited. Lands of this character are admittedly within the jurisdiction of the land court. The court, however, in *Teschemacher* v. *Thompson* undertook to decide the case *upon the assumption* that the controversy involved lands below the line of ordinary high tide. It is thus manifest that the case is without value as a precedent, and that the views expressed, while entitled to respect, are not authoritative.

The power of the land court to divest California of her dominion in favor of a private Mexican claimant was not debated. It was assumed in the opinion without argument. Moreover, it is to be noted that in the brief of counsel no point was made denying the jurisdiction of the land court and quite evidently the question was not considered, although the effect of the decision is to assume the point.

II.

The effect of the decree of confirmation as a limitation of the powers of the land department.

By the Act of March 3, 1851, and its amendments, a dual agency was set up and the limit of the duties from time to time assigned respectively to each must be clearly understood.

To the commission was assigned the judicial duty of settling the validity of all Mexican claims; to determine the acreage of quantity claims or "floats," and to settle the metes and bounds of parcels definitively granted by the Mexican government. *Hornsby* v. *United States*, 10 Wall. 224.

To the land department was assigned the duty of locating floating grants and in respect of definitive grants to link them with the public system of surveys by running out, on the ground, metes and bounds theretofore set forth in the decree of confirmation. *United States* v *Hancock*, 133 U. S. 193, 196.

Under section 13 of the original Act and under the Act of June 14, 1860, c. 128, 12 Stat. 33, a *supervision* of surveys was confided to the commission and these could be by it corrected through *judicial order*. *Dominguez* v. *Banning*, 167 U. S. 723, 737–739. Because of the remedy thus afforded it was held in that case that *fast land* constituting parcel of the *public domain of the United States* passed or did not pass to the Mexican claimant according as such fast land was within or without the lines of the *survey* embodied in the patent and that the terms of the

decree of confirmation would not be collaterally looked to to vary this result.

However, by the Act of July 1, 1864, c. 194, 13 Stat. 332, the Act of June 14, 1860, *supra*, was repealed (*Cragin* v. *Powell*, 128 U. S. 691, 697), and judicial power theretofore exercised to revise or correct was extinguished. Hence when the survey in the case at bar was made (1867), control of it lay with the federal land department.

The Government does not contend that, in respect of swamp lands or high lands or any other class of lands subject to sale or other disposition by Federal laws, or of the character technically defined as "public lands" or "public domain," patents of Mexican claims issued by the land department in pursuance of its functions under the Act of March 3, 1851, and its amendments, can be collaterally assailed. This contention would seem foreclosed by the reasoning in *Dominguez* v. *Banning*, *supra*.

It does, however, most earnestly insist that the independent jurisdiction and authority of the land department to function in respect of permanently submerged lands not a part of the technical public domain must, if it exists, be sought in the text of the Act of March 3, 1851, and amendments. Apart from these statutes the land department possesses no power to adjudicate questions of title. *Iowa* v. *Rood*, 187 U S. 87, 93. Furthermore, by the true construction of the statute its independent juris-

diction was plainly limited to the duty of laying down on the official surveys of the technical "public domain" the dividing lines between the portion belonging to Mexican claimants and the portion belonging to the United States. The arguments upon which this position is based are obviously the same as those which have already been stated under point one in respect of the jurisdiction of the land commission.

But in this place the Government contends secondly that the powers and jurisdiction of the land department have another and a further limitation; that they are restricted by the terms of the decree of confirmation and under this head it presents two points:

1. The decree of confirmation read as a single document and construed in accordance with all applicable rules of conveyancing does not include any land below the ordinary high water mark of the peninsula.

The descriptive boundary here in debate is written in the Mexican grant as follows:

> "West by the bay or anchorage for ships."
> R. 27.

Without rehearsing the chain of title appearing on pages 8–10 of its brief, the Government again respectfully urges that this description was adopted by express reference in the petition to the land commission (R. 28) and again adopted in the decree of confirmation. R. 33. It is true that in the latter

the word "bay" is left out and that the call reads: "West by the anchorage for ships," but the decree by reference explicitly incorporates the petition which in turn incorporates the Mexican patent. No claim was put forward in the pleadings and there was no adjudication involving lands outside the peninsula of San Diego, and the omission of the word "bay" in the decree was obviously a mere draftsman's oversight. It has no legal consequence. Either phrase "bay or anchorage for ships" or simply "anchorage for ships" are words descriptive of waters and denote the contiguous body of water by which the peninsula of which confirmation was asked was aptly and exactly bounded. No trained conveyancer, interpreting the decree without the aid of the construction put upon it by the surveyor, would willingly admit that any lands below high water mark were described or included in it. Lands bounded by a sheet or body of navigable water, locally known as the "anchorage for ships" or as "the bay or anchorage for ships," are bounded by the high tide mark of the water. *Shively* v. *Bowlby*, 152 U. S. 1, 29.

2. Such being the only plausible or reasonable construction of the decree when considered by itself and as a *single* document or muniment of title, what is to be said as to its conclusiveness and as to the authority of the land department to vary its terms in a case where an unmistakable bound requiring no location on the ground is named therein and fixed thereby?

It is clearly implied by *Dominguez* v. *Banning*, *supra*, that a departure from the terms of a decree of confirmation, whereby portions of the "public lands" as technically defined are erroneously or wrongfully included in a survey, does not furnish ground on which the patent based thereon can be collaterally assailed.

Nevertheless, the land department is so far controlled by a decree of confirmation that, whenever that decree fixes an unmistakable and definite bound running along high tide mark of navigable water—thereby defining the boundary between the private claimant and the public property of a sovereign state—the land department is then wholly without power or jurisdiction to depart from the decree and thus to extinguish, by its survey and patent, the title of the State. This latter proposition, it is believed, is fully sustained by the following cases:

> *Tripp* v. *Spring*, 5 Sawyer, 209, 215;
> *United States* v. *Hancock*, 133 U. S. 193, 196;
> *Packer* v. *Bird*, 137 U. S. 661, 672;
> *Knight* v. *Land Ass'n.*, 142 U. S. 161, 182–184.

The conclusiveness of the metes and bounds definitively established by the land commission is thus stated by this court in *United States* v. *Hancock* (p. 196):

> It is obvious that the confirmation was of a tract with specified boundaries, and as such covered all the land within those boundaries, irrespective of quantity, and this, notwith-

> standing there appeared in the prior proceedings statements that the tract contained a certain amount, "a little more or less," which amount was very much less than that included within the boundaries. "When a decree gives the boundaries of the tract to which the claim is confirmed, with precision, and has become final by stipulation of the United States and the withdrawal of their appeal therefrom, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies." *United States* v. *Halleck*, 1 Wall. 439; *United States* v. *Billing*, 2 Wall. 444; *Higueras* v. *United States*, 5 Wall. 827. And the act of Congress of July 1, 1864, 13 Stat. 334, §7, requires the surveyor general, "in making surveys of the private land claims finally confirmed, to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim."

So also in *Packer* v. *Bird*, it is said (p. 672):

> In *Railroad Company* v. *Schurmeir*, 7 Wall. 272, 288, the court said that in view of this legislation and other similar acts it did not "hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways." The same rule

> applies when the survey is made and the patent is issued upon a confirmation of a previously existing right or equity of the patentee to the lands, which in the absence of such right or equity would belong absolutely to the United States, unless the claim confirmed in terms embraces the land under the waters of the stream.

Tripp v. *Spring*, like *Knight* v. *Land Ass'n*, involved a parcel below high water mark of Mission Creek. It was decided in 1878 by Justice Field, who had, as circuit justice, himself handed down the decree binding the pueblo of San Francisco by the "bay of San Francisco," meaning thereby high water mark crossing inlets and creeks from headland to headland. As pointed out in the *Knight* case (page 171) the first survey of the pueblo by Stratton (subsequently approved by the surveyor general and November 11, 1878, by the commissioner of the land office) departed from the terms of the decree because the surveyor ran his lines, not across Mission Creek from headland to headland, but following high tide line up to the head of the creek, crossing over and coming down to the bay again on the other side.

The invalidity of this action of the surveyor whereby a definite boundary fixed by a decree was altered by the land department assuming to act under authority of the Act of July 1, 1864, *supra*, is thus characterized by Mr. Justice Field (p. 215):

> The suggestion that the survey of the pueblo claim forwarded to the land department at Washington, follows the banks of Mission creek,

> cannot have any weight in the case. The decree confirming the claim of the city fixes the bay of San Francisco at ordinary high-water mark as its eastern boundary, and this line cannot be changed by the surveyor-general, or any department of government. . . . Any patent of the United States which may hereafter be issued to the city from the land department at Washington can neither add to nor take from the title already vested in the city and those claiming under it. The confirmation approved and affirmed by the act of congress will control any patent which the department may issue. * * *

In *United Land Ass'n* v. *Knight*, 85 Calif. 445, it was held that when a decree of confirmation settled the boundaries of a confirmed grant by reference to unmistakable marks fixed by nature, it was not within the province of the land department to depart from them, and that its action in so doing was wholly void and subject to collateral attack. The judgment was reversed by this court but not on the points just stated. The California Supreme Court in the *application of this principle* went on to say that by the terms of the decree of confirmation the bounds of the pueblo of San Francisco followed the banks of Mission Creek and that the second survey and the patent cutting across the mouth of Mission Creek failed to follow the decree.

On this point alone—the proper construction of the text of the decree of confirmation—the judgment of the California court was reversed by this court.

Knight v. *Land Ass'n*, 142 U. S. 161, where it was said (pp. 182, 184):

> The only remaining question in the case, as we understand it, and as we desire to consider it, may be thus stated: Admitting that the Von Leicht survey is correct and follows the decree of confirmation; admitting, also, that the patent followed the survey and the decree, and that the premises in dispute are embraced in the patent: Was parol evidence admissible to show that these premises were below the ordinary highwater mark—not of the bay of San Francisco, but of *Mission Creek*, a navigable arm of the bay, as that line existed at the date of the conquest from Mexico in 1846? * * *
>
> If we have succeeded in showing that the tract in dispute was part of the land claimed by the city of San Francisco as successor of the Mexican pueblo of that name; that it is within the four square leagues described in the decree of the United States Circuit Court for the district of California, entered May 18, 1865; that that court decided and decreed that the claim of title was valid under the laws of Mexico; that the official survey of the United States officers is correct and followed the decree of confirmation; and that the patent of the government of the United States, following the survey and decree, embraced within its calls the property in dispute; we think it clearly follows that the patent of the government is evidence of the title of the city under Mexican laws, and is conclusive, not only as against the government and against all parties

> claiming under it by titles subsequently acquired, but also as against all parties except those who have a full and complete title acquired from Mexico anterior in date to that confirmed by the decree of confirmation. This conclusion is fully sustained by the decisions of this court.

From the foregoing it appears with unmistakable clearness that the title derived from San Francisco was sustained because—

(1) The land was a parcel of premises claimed by the city as successor of the Mexican pueblo.

(2) It was within the *bounds described* in the decree of confirmation of May 18, 1865.

(3) The parcel was held by a valid Mexican title as *held and decided* by the federal court.

(4) The official survey was *correct* and *followed* the decree of confirmation.

(5) The patent followed the survey and *decree* and embraced the property in dispute.*

In the case at bar the facts as to the title are precisely the reverse of those upon which that set up in the *Knight* case was held unassailable. Here no claim to the submerged lands was set forth in the petition for confirmation. The court did not and could not have decided that this acreage was held by a valid Mexican title bacause (a) it was not within the granting power of the territorial governor; (b)

* In Mr. Justice Field's concurring opinion, pp. 206–209, it is also pointed out that the error of the court below lay in assuming that the decree of confirmation called for any line other than the one actually surveyed and embodied in the pueblo patent.

it was not in fact included in the Mexican patent; (c) it was not claimed in the petition. The court's adjudication was confined to the fast land claimed and described in the petition and known by the name of the Island or Peninsula of San Diego. It was not within the bounds set forth in the decree of confirmation and the official survey made years afterwards was incorrect and failed to follow the decree.

Since the survey and patent were not the acts of the court interpreting the language of its own decree, but merely ministerial acts performed by officers whose errors the court possessed no jurisdiction to correct, it follows that their action was void on the analogy of cases like *Salt Lake Inv. Co.* v. *Oregon Short Line*, 246 U. S. 446, and other cases cited.

Moreover, since the Government is here only as the condemning party and entitled to an investigation of the title to these tidelands to the end that the award may be distributed to the true owner thereof, it insists that Coronado Beach Company has not acquired a prescriptive title against California, the true owner, by virtue of the Act of March 3, 1891, c. 561, 26 Stat. 1099, §8. The claim of California to these lands is not affected by this statute. They were never public lands. *La Roque* v. *United States*, 239 U. S. 62, 68.

A vital distinction between *Dominguez* v. *Banning* and the case at bar lies in this: that in respect of "public lands" a mistake of the surveyor binds both *parties to the judgment* because these lands *belong*

either to the United States as "public domain" or to the claimant under his Mexican title; but in respect of lands under navigable waters, since California is not a party except by a fiction, the mistake does not bind the State unless it be shown that the survey and patent encroaching on navigable waters is justified and authorized either by an Act of Congress passed to carry out a treaty or at least by the decree of a court constituted by an Act of Congress. It has never heretofore been held that the *State's title* was capable of destruction on the foot of treaty obligation by anything short of a *decree*. It is argued that the State took as successor in title to the federal government, but more justly, her sovereign dominion and ownership had birth in the Constitution by force of which her admission clothed her with equality of rights with her sister States. Subject as these rights were to treaty claims, the settlement of these obligations was not delegated to administrative officials and her rights left to the hazard of their mistakes or misprisions. At most, the treaty obligation must be declared by a *court*.

III.

The quality and incidents of title to submerged lands under the law of California.

On the assumption that Coronado Beach Company had title to the submerged lands adjacent to its fast land, the court below inquired of counsel in regard to the extent or quality of its ownership. R. 41, 42.

The reply was that its right was to utilize these tidelands without a franchise as private owner. This theory of practically unrestricted private ownership was the basis of the expert testimony and of the verdict appraising the fast lands at a sum exceeding the Government's estimates by more than $3,000,000. Yielding to the owner's contention as to the quality of its estate, the jury was instructed (R. 105, 107, 111–112):

> The land in question whose value you are to fix, and which has been described in the act of Congress as the whole of North Island, includes not only the upland, as it has been termed, but also the tidelands in question. The ownership of the Coronado Beach Company in the whole of North Island does not stop at the line of ordinary high tide. That ownership is extended out by the United States patent and by the law of this case to the anchorage of ships, and the line of that anchorage is precisely defined by the United States survey accompanying the patent, and which has been delineated before you upon the maps admitted in evidence. Such tidelands comprise, in round figures, 663 acres, and in those tidelands the Coronado Beach Company has all the rights of full ownership, subject to the reasonable public regulation, and in this respect I instruct you that it is a reasonable public regulation of the United States Government that the bulkhead line be fixed as it has been, beyond which a solid fill is not permissible without consent of the Government, and that it is

> likewise a reasonable public regulation that the pierhead line be fixed as it has been fixed, and between that line and the bulkhead line open wharves may be constructed and used by the owner. But it is a property right and an attribute of the ownership of the Coronado Beach Company that it may construct wharves, docks, piers, warehouses, terminals, or other improvements on these submerged lands, subject to these regulations; and in so constructing such improvements the Coronado Beach Company would be exercising the right to use its privately owned tidelands. And you are further instructed that the title to these tidelands was not derived by the Coronado Beach Company from the State of California, and that the State of California is not the owner thereof, but that the same was derived from the former Government of the country, and that the title so derived has been confirmed by judicial decree and conclusively established and defined as against the Government by the survey and patent.

It should be stated here that, considering this ruling, the instruction was the *law of the case* and hence, obviously, it was not necessary that the Government object or except to *evidence* admitted on this legal theory. It was only necessary to except to the ruling.

In the oral argument it was insistently urged that the Government's exception went only to that part of the quoted ruling which dealt with the

naked legal title to the submerged land and did not cover the court's definition of the quality or character of the title and the legal incidents annexed to it. Emphasis was put upon the following colloquy appearing at pages 104–5 of the record.

> The COURT. Are there any exceptions, gentlemen, to the charge to the jury?
>
> Mr. DENIS. The government has none, excepting the refusal of the court to charge as requested by the government in the last instruction, in regard to tidelands. And then the government also desires to except to the instruction with reference to the title to the submerged lands. With these exceptions I know of no other instruction.
>
> The COURT. You particularly refer to the instruction that the patent extends out to the anchorage? Including 663 acres?
>
> Mr. DENIS. The whole of that instruction; yes, your Honor; those are the only two.
>
> The instructions given by the court and excepted to by plaintiff reads as follows: (Here follows the instruction in full as already quoted, *supra*.)

In the opinion recently handed down no reference to the assignment of error (R. 111–12) taken on the whole of this instruction appears, possibly because it was considered that the exception was not duly saved at the trial. Consequently, before discussing the substantive question the procedural point will be adverted to.

As the record shows the question of mere titular ownership was of slight importance. The exagger-

ated appraisal of the fast land depended on the right to *utilize* this titular ownership without a franchise as private property free of any state control or future federal control. It would seem obvious therefore that question as to the existence of this estate was inseparably bound up with its incidents and the rights annexed to it. Consequently, the court, having ruled that private ownership extended to the so-called anchorage, undertook to define the incidents of the estate, instructing the jury that the Coronado Beach Company had all the rights of full ownership subject to reasonable public regulation, and furthermore proceeded to define with precision the extent of reasonable public regulation, instructing the jury that it consisted in the right of the Federal government to establish present bulkhead and pierhead lines only, and following this by the flat declaration that it was a property right and an attribute of ownership of the Coronado Beach Company that it might construct wharves, docks, piers, warehouses, terminals or other improvements on these submerged lands *subject to these regulations;* and in so constructing such improvements the Coronado Beach Company would be exercising the right to use its privately-owned tide-lands.

Counsel for the Government excepted to the *whole* of that instruction. Since the vital thing in the ruling was the extent or quality of the ownership and the use to which the owner was free to put these

lands, it is much too narrow to say that the exception must be construed as applying only to the question of naked legal title. It went to the whole; both title and the defined incidents thereof. But this is not all. On pages 107–8 of the bills of exceptions appears a "Specifications of errors of law occurring at the trial," in which the entire instruction is included. R. 107. This was allowed, signed and sealed and made by the court a part of the bills of exceptions. Since not only title but the extent of plaintiff's rights under it was (as shown R. 41–2) in debate and was a vital issue, this court is not bound by any strained and narrow construction of the particular colloquy transcribed on pages 104–5. The government may properly insist that the full instruction appearing on page 107 was excepted to and that the exception was admitted and formally embodied in a *bill of exceptions* by the court below.

The substantial injury resulting from the instruction has been argued in the government's brief, 46–54. The jury was told that private ownership of the submerged land was subject to *existing* federal regulation only, and the fast lands were valued and the appraisal augmented because of such exclusive private ownership and the accompanying freedom to utilize as private owner the submerged lands. The jurors were not instructed as to undoubted federal power hereafter, without compensating the owner, to move back existing harbor lines and to

forbid private structures beyond them. *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251.*

The existence of concurrent regulatory powers possessed by the State of California (*Cummings* v. *Chicago*, 188 U. S. 410, 431), who, in her legislative discretion, might demand that this harbor entrance in the interest of navigation, fishing, etc., be kept free of all private obstruction, was ignored by the court and necessarily also by the jurors in weighing evidence and appraising values.

From these considerations emerges the legal question to be decided. What is in fact the nature and quality of the incidents annexed to titular ownership of submerged lands derived from a confirmed Mexican grant.

It has been settled by this court that this is a question of local or general law and that the quality of the estate was not defined or determined by the

*In that case it was held that a wharf, recognized as property by State law and, moreover, built within harbor lines already established by the Federal government, must be removed without compensation when, thereafter, in order to widen the available fairway, the Secretary of War established new harbor lines farther in shore, although the immediate purpose of government might have been to provide space for mooring or maneuvering the vessels of the navy. Is it not equally true that in developing aeroplane bases existing harbor lines may be changed and obstructions beyond forbidden to permit open water spaces like this to be utilized as landing places and maneuvering grounds for naval hydroplanes. To illustrate, assume that, instead of North Island, a site on the opposite shore had been chosen for this air station and that unobstructed use of the water covering these submerged lands had been found essential to its operation. It could not be contended that power to move back existing harbor lines might not be exercised although thereby private commercial development of North Island might be impeded or rendered impossible. This again is but an instance of the fallacy that private rights of ownership of lands submerged by navigable water are beyond legislative control or that they are possible or conceivable except as a result of *legislative license* to wharf out, etc. *Illinois Central R. R.* v. *Illinois*, 146 U. S. 387, 452.

confirmation had under the Act of March 3, 1851. *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217.

The inquiry, therefore, is what is the California rule in regard to such ownership. Does title to submerged lands in California derived from Mexico invest the owner with the right to improve them without a franchise from the state, as claimed by counsel. No authority on this precise point has been found. In *People* v. *California Fish Co.*, 166 Calif. 576, 138 Pacific 79, the strictly qualified nature of the title to tidelands acquired by *state grant* is extensively discussed and accurately defined.

These lands are not tidelands; they are permanently submerged under navigable water. It is too clear for debate that if the question were presented to the California courts, the restrictions and limitations on the title set forth in the case just cited would be applied with equal or greater emphasis to the lands here in question.

Since, in the case at bar, it would be necessary for the court to determine what the local law is in regard to these lands, it is submitted with confidence that the cited case is persuasive authority and that no greater rights flow from ownership of submerged land derived from Mexico than are annexed to such ownership when derived from the state.

That confirmation of a Mexican title divests the Federal government of its control of navigable water resting upon the soil forming its subject is hardly arguable. Such property is onerated with servitudes perpetually restricting its free private use.

The court is therefore respectfully urged, in view of the foregoing considerations, to grant a rehearing of the case.

April, 1921.

LESLIE C. GARNETT,
Special Assistant to the Attorney General.
CHARLES S. LAWRENCE,
Attorney.
WILLIAM L. FRIERSON,
Solicitor General.

I hereby certify that the foregoing petition for rehearing is, in my opinion, well founded and that it is presented in good faith.

WILLIAM L. FRIERSON,
Solicitor General.

CHAP. XLI.—*An Act to ascertain and settle the private Land Claims in the State of California.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

SEC. 2. *And be it further enacted*, That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

SEC. 3. *And be it further enacted*, That such clerks, not to exceed five in number, as may be necessary, shall be appointed by the said commissioners.

SEC. 4. *And be it further enacted*, That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interests of the United States in the premises, to continue him in such agency

as long as the public interest may, in the judgment of the President, require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

SEC. 5. *And be it further enacted*, That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

SEC. 6. *And be it further enacted*, That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and to examine witnesses in any case pending before the commissioners, that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

SEC. 7. *And be it further enacted*, That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpœna commanding the attendance of a witness or witnesses before the said board or any commissioner.

SEC. 8. *And be it further enacted*, That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

SEC. 9. *And be it further enacted*, That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present

claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trail, unless, on cause shown, the same shall be continued by the court.

SEC. 10. *And be it further enacted*, That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of

the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

SEC. 11. *And be it further enacted*, That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 12. *And be it further enacted*, That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

SEC. 13. *And be it further enacted*, That all the lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners

within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: *Provided, always,* That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided, further,* That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been

finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

SEC. 14. *And be it further enacted*, That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village.

SEC. 15. *And be it further enacted*, That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be

conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

SEC. 16. *And be it further enacted*, That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

SEC. 17. *And be it further enacted*, That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; and the clerks herein provided for shall be allowed and paid at the rate of one thousand five hundred dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

SEC. 18. *And be it further enacted*, That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpœna. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpœna, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

APPROVED, March 3, 1851.

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